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November 9, 2004

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**BY HAND**

Mr. Jeff S. Jordan  
Supervisory Attorney  
Complaints Examination & Legal Administration  
Federal Election Commission  
999 E Street, NW  
Washington, DC 20463

Re: MUR 5541 (The November Fund)

Dear Mr. Jordan:

This office represents The November Fund and its Treasurer, Bill Sittmann, (collectively "Respondents") in the above-captioned MUR. We have reviewed the Complaint filed on September 24, 2004, by Citizens for Responsibility and Ethics in Washington. As detailed below, the Complaint alleges immaterial facts and incorrect legal theories that fail to state a claim that a violation has occurred. Therefore, the Commission should find no reason to believe that Respondents violated the Federal Election Campaign Act of 1971, as amended ("Act").

#### THE RESPONDENTS

The November Fund is an unincorporated association that is exempt from taxation as a political organization under section 527 of the Internal Revenue Code. Bill Sittmann is the Treasurer of The November Fund. The November Fund has filed both a Political Organization Notice of Section 527 Status (Form 8871) and Political Organization Reports of Contributions and Expenditures (Form 8872) with the IRS as required by law.

As explained on its website, [www.thenovemberfund.com](http://www.thenovemberfund.com): "The November Fund is dedicated to telling America the truth about trial lawyers, their efforts to stop legal reform, and the impact of the trial-lawyer lobby in Washington, D.C." This is consistent with representations The November Fund made to the IRS on its Form 8871 which provides the following information in response to a question regarding its purpose: "To engage in political activities that educate the general public regarding the public policy positions of candidates for federal, state, and local office and mobilize voters in compliance with federal and state laws." To this end, The November Fund disseminated information about trial lawyers and the medical malpractice crisis in this country through its website. As its website reflects, some

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of this information included references to candidates for President and Vice-President. However, any audio or video that mentioned the name or depicted the image of an individual who was a candidate was disseminated solely over the Internet.

The November Fund has not expressly advocated the election or defeat of a clearly identified candidate, coordinated any of its activities with any political party or candidate, or engaged in "electioneering communications."

#### THE COMPLAINT

The Complaint was filed shortly after The November Fund was established. The allegations were speculative at the time of the Complaint which wildly and inaccurately claimed what The November Fund "plans" to do. As will be explained, the allegations are meritless.

As a preliminary matter, the Complaint's section regarding "Factual Allegations" fails to allege even the existence of any communications other than those on The November Fund's website. Accordingly, the Complaint does not – and cannot – allege that The November Fund engaged in communications that either contained express advocacy, could have been coordinated with a political candidate or party, or satisfied the definition of "electioneering communication."<sup>1</sup> Fully aware of these concepts, The November Fund scrupulously avoided disseminating communications that could have subjected it to regulation under these or any other restrictions imposed by the Act and the Commission's regulations. However, the lack of any such allegations – or even an allegation that The November Fund disseminated communications other than those on its website – places Respondents in the impossible position of having to prove a negative: The November Fund did not engage in any communications that are regulated by the Act. Rather than attempt to prove this fact, this letter responds to the allegations actually made in the Complaint. In all other respects, The November Fund denies that any of its communications violated the Act.

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<sup>1</sup> As a simple exploration of The November Fund's website will show, none of its content contains express advocacy. Furthermore, the Commission's coordination and "electioneering communication" regulations explain that neither apply to websites. See note 7 and Count IV discussion *infra*.

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The Complaint contains four Counts of alleged violations of the Act. Only Counts I, II, and IV allege violations by Respondents. Count III alleges a violation by the Chamber of Commerce of the United States. However, none of the Counts allege appropriate facts or espouse theories of law under which the Respondents can be found to have violated the Act. Accordingly, the Commission should dismiss the Complaint.

**Count I (Political Committee Status)**

Count I alleges that The November Fund is a "political committee" because it "has as a 'major purpose' the intent to influence a federal election and it has received contributions or made expenditures of over \$1,000 in a calendar year." Complaint ¶ 16. Count I concludes that The November Fund has a "'major purpose' of influencing the election of a particular candidate or candidates for federal office" based upon a public statement by The November Fund's director. Complaint ¶ 20.<sup>2</sup> Count I further concludes that the definitions of "contribution" and "expenditure" have been satisfied because The November Fund has raised contributions "for the purpose of influencing the upcoming November presidential election" and "has indicated that it plans to spend money on advertisements in both print and on television attacking or opposing Senator John Edwards ... for the purpose of influencing a federal election." Complaint ¶ 21. As an alleged "political committee," Count I charges that The November Fund has violated the Act because it has not filed the appropriate political committee registration and reporting forms and has received contributions in excess of the political committee contribution limits and from impermissible sources. Complaint ¶¶ 17, 22.

**Legal Analysis**

Contrary to the assertions in the Complaint, the Act and Commission regulations do not define the term "political committee" by reference to a "major purpose." "The term 'political committee' means ... any committee, club, association, or other group of persons which receives contributions aggregating in excess of \$1,000

<sup>2</sup> The statement quoted in the Complaint is: "Burton has a policy of not being involved in candidates' campaigns in any way, so I took a leave of absence so the company would not be involved." From this quote, the Complaint inaccurately concludes that The November Fund was created "for the express purpose of defeating Federal candidate John Edwards - as admitted by the Fund's director."

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during a calendar year or which makes expenditures aggregating in excess of \$1,000 during a calendar year; ...." 2 U.S.C. § 431(4); *see also* 11 C.F.R. § 100.5. The terms "contribution" and "expenditure" are both defined as "anything of value ... for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i) & (9)(A)(i); 11 C.F.R. §§ 100.52(a); 100.111(a). The phrase "for the purpose of influencing" an election has been narrowed by Supreme Court precedent to only include disbursements "for communications that expressly advocate<sup>108</sup> the election or defeat of a clearly identified candidate." *Buckley v. Valeo*, 424 U.S. 1, 80 (1976); *see also* *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 248-49 (1986). The text of footnote 108 in the quote above references *Buckley*'s footnote 52 which reads: "This construction would restrict ... application ... to communications containing express words of advocacy of election or defeat, such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject.'" 424 U.S. at 44 n.52. This "expressly advocating" standard has since been codified in Commission regulations. 11 C.F.R. § 100.22.<sup>3</sup> Therefore, a "group of persons" is a "political committee" only if it receives "contributions" for the purpose of making, or otherwise makes, "expenditures" that "expressly advocate the election or defeat of a clearly identified candidate."

#### Discussion

Count I inserts a "major purpose" test that is not otherwise found in the Act or Commission regulations and claims that the test is satisfied by distorting the meaning of one public statement by The November Fund's director. As illustrated in the paragraph above, the "major purpose" test is not itself a legally operative standard for defining a "political committee." In fact, the cases the Complaint cites that reference an organization's "major purpose," all do so in a manner that does not otherwise disturb the above-quoted definitions of "political committee," "contribution," and "expenditure."<sup>4</sup> In addition, the Commission recently

<sup>3</sup> While subsection (a) of this regulation generally follows the above-quoted *Buckley* formulation, subsection (b) is more broad and has been held unconstitutional. *See Virginia Soc'y for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001); *Maine Right to Life Comm. v. FEC*, 98 F.3d 1 (1st Cir. 1996); *Right to Life of Dutchess County, Inc. v. FEC*, 6 F. Supp. 2d 248 (S.D.N.Y. 1998).

<sup>4</sup> In *Buckley v. Valeo*, the Court described "political committees" as "organizations ... the major purpose of which is the nomination or election of a candidate." 424 U.S. at 79. The Court nonetheless recognized that a "'political committee' is defined only in terms of amount of annual 'contributions' and 'expenditures'" and that the use of the phrase "expenditure[]" could raise ...

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confirmed that an organization's "major purpose" is not an appropriate measure of whether the organization meets the definition of a "political committee." See FEC Open Meeting Agenda Doc. No. 04-100 at 37, as amended by Agenda Doc. No. 04-100-A at 3 (Oct. 28, 2004).<sup>5</sup>

Count I proceeds to claim that The November Fund is a "political committee" because it has received "contributions" for the purpose of making "expenditures" that it "has indicated that it plans" to make "for the purpose of influencing" an election. However, Count I does not allege that the expenditures were in fact made or, if made, contain express advocacy. As explained above, an "expenditure" is only of legal consequence under the Act if it expressly advocates the election or defeat of a clearly identified candidate. The Complaint states that The November Fund "plans to spend money on advertisements in both print and on television attacking or opposing Senator Edwards," but fails to allege that any of the advertisements contain express advocacy. Accordingly, Count I has not properly alleged that The November Fund meets the definition of "political committee" because Count I does not – and cannot – establish that The November Fund has or

(Continued . . .)

vagueness problems." *Id.* Accordingly, the Court narrowed the definition of "expenditure" by applying the express advocacy standard. *Id.* at 79-80.

In *FEC v. Massachusetts Citizens for Life, Inc.*, the Court conceded that a nonprofit corporation would otherwise have to establish a "political committee" because it engaged in express advocacy "expenditures." 479 U.S. at 253 The Court ultimately held that the unique characteristics of the corporation at bar exempted it from regulation under the Act, but warned that if the corporation's expenditures "became so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee." *Id.* at 262.

Though the district court in *FEC v. GOPAC, Inc.* employed the phrase "major purpose," it still required that the definition of "political committee" be satisfied by reference to whether the organization received "contributions" or made "expenditures." 917 F. Supp. 851, 859 (D.D.C. 1996) ("The 'major purpose' test treats an organization as a 'political committee' if it receives contributions and/or makes expenditures of \$1,000 or more and its 'major purpose' is the nomination or election of a particular candidate or candidates for federal office.").

<sup>5</sup> Though the Complaint offers no criteria for determining an organization's "major purpose," it nonetheless determines that The November Fund satisfies the "major purpose" test based upon a quote by its director. See note 1 *supra*. However, the Complaint's conclusion is a total nonsequitur and is completely unsupported by the substance of the quote.

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will engage in "expenditures" for express advocacy. Furthermore, The November Fund denies that it has financed any communications that contain express advocacy.

The Act, Commission regulations, and the Supreme Court all agree that an independent organization like The November Fund may only be regulated as a "political committee" if it receives "contributions" or makes "expenditures" that expressly advocate the election or defeat of a clearly identified candidate. The Complaint raises a red herring by contorting the definition of "political committee" to insert a "major purpose" test, but nonetheless fails to allege the existence of express advocacy. Accordingly, Count I fails to state a claim that The November Fund is a "political committee."

**Count II (Coordination)**

Count II alleges that under "the Commission's [coordination regulation] content and conduct standards," The November Fund is "coordinating its activities with Bush-Cheney '04." Complaint ¶ 23. Count II states that the content criterion is satisfied because The November Fund "plans to use television ads and mailings that would feature a named Federal candidate" and "is proposing" public communications that "will refer to a clearly identified candidate for Federal office ... within 120 days of the election [that] are directed to voters." Complaint ¶¶ 29, 30.<sup>6</sup> Count II begins its analysis of the conduct criterion by stating that the co-chairs and director of The November Fund – Craig Fuller, William Brock, and Ken Rietz – "are all closely connected to a 'political party committee,' i.e. the Republican party, and all three men have ties to the Bush Administration." Complaint ¶ 34. These alleged "connections" are detailed as follows:

Mr. Fuller has served as the Chief Executive Officer of the National Association of Drug Stores. In that position, Mr. Fuller has worked closely with the Bush Administration to prevent the importation of prescription drugs from Canada and to pass the 2003

<sup>6</sup> Count II also alleges that "the communications will advocate the defeat of clearly defined Federal candidates" based upon a quote by Bill Brock that reads: "...it is time to tell the truth about the role John Edwards and the trial lawyers have played in driving up healthcare costs." Complaint ¶ 29. This allegation is presumably an attempt to satisfy an alternative content factor that is based upon the express advocacy standard. See 11 C.F.R. § 109.21(c)(3). As explained in the Count I section *supra*, The November Fund has not expressly advocated the election or defeat of any clearly identified candidate, and this quote does not alter that conclusion.

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**Medicare Reform Bill. Previously, Mr. Fuller served as an Assistant to President Reagan for Cabinet Affairs, as Chief of Staff to Vice President George Bush and as the Chair of the 1992 Republican National Convention....**

**Mr. Brock has a lengthy record in Republican party politics. He is a former Representative and Senator from Tennessee and he served as the Chairman of the National Republican Committee from 1977-1981. After President Reagan was elected, Mr. Brock served as U.S. Trade Representative until 1985 when he became the Secretary of the Department of Labor. In 1987, Mr. Brock left government service to become a consultant on trade issues. Mr. Brock continues to have ties to the Republican party: he served as one of the heads of then-candidate Bush's 2000 Maryland presidential campaign; and he was appointed by President Bush to chair the West Coast Port Worker Lockout Panel....**

**Mr. Rietz also has strong ties to the Republican party: he was one of 36 campaign insiders who served as advisors to President Bush's 2000 campaign; before joining Burson-Marsteller in 1989, he worked for a Republican Member of Congress; and he served as chairman and political director of the Republican National Committee.**

**Complaint ¶¶ 31, 32, 33.**

**Count II concludes its analysis of the conduct criterion by saying: "These connections, when considered in concert with Bush-Cheney '04 campaign manager Ken Mehlman's meeting, sponsored by the Chamber of Commerce, to discuss ways that trade associations could assist President Bush's re-election effort, satisfy the 'conduct standard.'" Complaint ¶ 34. This conclusion is based upon the following description of a meeting held at the U.S. Chamber of Commerce:**

**Bush-Cheney '04 Campaign Manager Ken Mehlman  
and members of various trade association groups met**

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at a closed door meeting sponsored by the Chamber of Commerce on April 19, 2004. *The Hill*, April 20, 2004 (attached as Exhibit B). At the meeting, Mehlman and the groups discussed get-out-the-vote practices for the presidential election. The meeting was apparently part of a larger effort by the Bush-Cheney Campaign to recruit trade associations to help with the President's re-election. *Id.*

Complaint ¶ 8. However, this statement appears to take some liberties with the facts presented in the cited news article which simply stated in two short paragraphs:

Yesterday, at a closed-door meeting of trade associations hosted by the U.S. Chamber of Commerce on get-out-the-vote practices, Ken Mehlman, manager of the Bush-Cheney campaign, decried the impact of soft-money groups.

"Thanks to 527s, we will be outspent by the Democrats," said Mehlman, according to a participant who took notes of the meeting. "MoveOn.org is a huge threat and has hurt the president. Every action makes a difference."

Complaint Ex. B.

**Legal Analysis**

Under the Commission's regulations, a finding of coordination must be premised on satisfaction of both content and conduct criteria. 11 C.F.R. 109.21(a). The content criterion is satisfied if, *inter alia*, the communication (1) is a "public communication;"<sup>7</sup> (2) refers to a candidate; (3) is disseminated within 120 days of an election; and (4) is directed to voters in the jurisdiction of the identified candidate. *Id.* § 109.21(c)(4). The conduct criterion is satisfied if, *inter alia*, the communication is made (1) at the request or suggestion of a candidate, political

<sup>7</sup> "Public communication means a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising. The term public communication shall not include communications over the Internet." 11 C.F.R. § 100.26.

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party, or an agent of the foregoing; (2) with the material involvement of a candidate, political party, or an agent of the foregoing; or (3) after substantial discussions about the communication with a political party committee, candidate, or agent of the foregoing. *Id.* § 109.21(d)(1)-(3).

#### Discussion

The Complaint fails to accurately allege facts to satisfy either of these criteria. First, the Complaint makes the conclusory allegation that The November Fund "plans" and is "proposing" communications that will satisfy the content criterion because the communications will refer to federal candidates within 120 days of the November 2, 2004, general election. The Complaint provides no specific examples of what types of communications have or will be disseminated. Failure to do so makes assessing satisfaction of the content criterion impossible.<sup>8</sup> Accordingly, the Complaint fails to sufficiently allege the existence of any communications that might satisfy the content criterion.

Second, the Complaint fails to sufficiently allege facts that satisfy the conduct criterion. Again, the Complaint makes the conclusory allegation that the conduct criterion is satisfied because Messrs. Fuller, Brock, and Rietz are "closely connected to ... the Republican party," "all three men have ties to the Bush Administration," and a "meeting, sponsored by the Chamber of Commerce, to discuss ways that trade associations could assist President Bush's re-election effort" was held. These facts, even if accepted as true, fall far short of satisfying the conduct criterion.

As a preliminary matter, the regulations regarding the conduct criterion all require that the conduct be assessed in relation to "*the* communication." 11 C.F.R. § 109.21(d)(1)-(3) (emphasis added).<sup>9</sup> Thus, the alleged conduct must be directly linked to specific communications. Because the Complaint has not alleged the

<sup>8</sup> The prospective nature of these allegations, if acted upon by the Commission, would lead to the perverse result of the Commission attempting to punish conduct that has not yet occurred, and may never occur.

<sup>9</sup> The one exception is found in the regulations defining the "material involvement" element which references: "The size or prominence of a printed communication, or duration of a communication by means of broadcast, cable, or satellite." 11 C.F.R. § 109.21(d)(2)(vi). However, use of the article "a" instead of "the" is necessary here to refer to categories of communications within which the communication at issue might fit.

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existence of any such communications, it is impossible to assess whether anyone engaged in coordinating conduct.

Nonetheless, the Complaint's above-quoted factual statements regarding Messrs. Brock, Fuller, and Rietz do not describe the requisite conduct necessary to establish coordination. The statements above describe prior work history and political experience, the most recent of which allegedly links Messrs. Brock and Reitz to the Bush campaign of 2000, four years ago. The statements are completely silent with regard to whether any of the communications that The November Fund "plans" or is "proposing" to make will be produced and distributed: (1) at the request or suggestion of Bush-Cheney '04; (2) with the material involvement of Bush-Cheney '04; or (3) after substantial discussions about the communication with Bush-Cheney '04. The Complaint provides absolutely no facts that satisfy any of these elements of the conduct criterion.

One allegation in the Complaint is based upon a passing hearsay reference in one press article. The article stated that the Chamber of Commerce hosted a meeting for trade associations regarding get-out-the-vote practices and that Bush-Cheney '04 campaign manager, Ken Mehlman, decried spending by 527 organizations while at the meeting. Yet, the Complaint insists that Mr. Mehlman was himself discussing get-out-the-vote activities by trade associations, even though the press account stated that his remarks were confined to criticizing 527 organizations. Furthermore, the Complaint fails to even allege that either Messrs. Brock, Fuller, Rietz, or any other principal of The November Fund attended the meeting. All three gentlemen have advised counsel that they did not attend the meeting.

Therefore, the Complaint is relegated to describing the political and professional careers of three of The November Fund's principals, describing a meeting they did not attend at which the Bush-Cheney '04 campaign manager spoke, and concluding that these descriptions, "when considered in concert ... satisfy the 'conduct standard.'" As explained above, the conduct criterion requires a thorough analysis of whether communications by The November Fund – which the Complaint has failed to allege even exist – were made (1) at the request or suggestion of, (2) with the material involvement of, or (3) after substantial discussions with Bush-Cheney '04. The Complaint does not allege any such conduct, and is left citing an inapposite news article about a meeting the principals of The November Fund did not attend and are not even alleged to have attended. Lastly, The November Fund denies that it has engaged in any coordination with a political candidate or party.

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The Commission's regulations require that a coordination claim satisfy both content and conduct criteria, yet, the Complaint fails to satisfy either. Accordingly, Count II of the Complaint fails to establish that The November Fund coordinated its activities with Bush-Cheney '04.

**Count III (Chamber of Commerce Donations)**

Count III alleges a violation by the Chamber of Commerce of the United States ("Chamber") by contributing corporate funds to The November Fund. All donations, including those by the Chamber, have been or will be reported to the IRS. Since The November Fund is not a "political committee," does not engage in express advocacy or "electioneering communications," and does not coordinate its activities with any candidate or political party, donations from incorporated entities like the Chamber are legally permissible.

**Count IV (Electioneering Communications)**

Count IV first alleges that The November Fund has violated the Act's "electioneering communication" provisions. Complaint ¶ 41. It then states that "The November Fund cannot pay for communications that promote support, attack or oppose a Federal candidate" if the communications are "made within 60 days of an election." Complaint ¶ 42.

**Legal Analysis**

An "electioneering communication" is defined to include "any broadcast, cable, or satellite communication which—

- (I) refers to a clearly identified candidate for Federal office;
- (II) is made within—
  - (aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or
  - (bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

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(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate."

2 U.S.C. § 434(f)(3)(A)(i). Communications disseminated over the Internet are not included within the definition of "electioneering communication." See 11 C.F.R. § 100.29(c)(1). Importantly, the "promote support, attack or oppose" formulation cited in Count IV is found in the so-called back-up definition of "electioneering communication" that was only to take effect if the primary definition was "held to be constitutionally insufficient by final judicial decision." See 2 U.S.C.

§ 434(f)(3)(A)(ii). However, the Supreme Court's decision in *McConnell v. FEC* upheld the constitutionality of the primary definition. 124 S. Ct. 619 (2003).

### Discussion

The Complaint fails to establish the existence of any "electioneering communications." Communications by The November Fund that referred to clearly identified candidates appeared on The November Fund's website. However, those communications are exempt from regulation as "electioneering communications" because they were disseminated over the Internet.

Instead, Count IV attempts to apply the "promote support, attack or oppose" formulation found in a Commission advisory opinion that is not relevant to this matter. See FEC Advisory Opinion 2003-37 ("Opinion"). As a preliminary matter, the Commission recently explained that "Advisory Opinion 2003-37 is hereby superseded." See FEC Open Meeting Agenda Doc. No. 04-100 at 37, as amended by Agenda Doc. No. 04-100-A at 3 (Oct. 28, 2004). Nonetheless, the Opinion states in no uncertain terms that it only applies to "political committees" and not to other tax-exempt organizations like The November Fund. The Opinion concludes its first paragraph with the caveat that the fact that the Opinion was requested by "a political committee is particularly relevant. This opinion does not set forth general standards that might be applicable to other tax-exempt entities." In an effort to obscure this important point, the Complaint cites passages from the Opinion, but omits other similarly critical qualifying language. First, the Complaint at paragraph 41 includes the following quote from the Opinion: "A payment for a communication that promotes, supports, attacks, or opposes a clearly identified Federal candidate is 'for the purpose of influencing a Federal election ... and is therefore an 'expenditure' within the meaning of 2 U.S.C. 431(9) ...'" However, the first set of ellipses replaces the crucial clause "when made by a political committee." Second, the

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Complaint quotes additional language from the Opinion at paragraph 42, but does not include the following statement found in a footnote directly after the quoted language: "In making this determination, the Commission is in no way addressing the legal status of organizations that are not political committees under the Act, ...." Opinion at n.3.

The Opinion clearly states that the "promote support, attack or oppose" standard only applies to entities that satisfy the definition of "political committee." As explained in the Count I section *supra*, The November Fund is not a "political committee." Therefore, The November Fund's communications cannot be subject to the Opinion's "promote support, attack or oppose" standard.

Count IV has not alleged facts that satisfy the above-quoted primary definition of the "electioneering communication" provision, and has misapplied a Commission advisory opinion in an attempt to subject The November Fund to a more broad standard not supported by the Act. Accordingly, Count IV fails to establish that The November Fund engaged in "electioneering communications."

#### CONCLUSION

For the foregoing reasons, the Commission should find that there is no reason to believe that The November Fund and its Treasurer, Mr. Bill Sittmann, have violated the Act, and this matter should be dismissed.

Sincerely,



Jan Witold Baran

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